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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. BENNIE DALE MOSES, JR., Defendant and Appellant.	C075945 (Super. Ct. No. CRF093273)

In 2011, defendant Bennie Dale Moses, Jr., appealed his convictions for 62 sex offenses. This court reversed and dismissed some of those convictions, affirmed the others, and remanded the matter to the trial court for resentencing. Defendant now appeals the sentence imposed on remand, contending he was entitled to retroactive application of Proposition 36, the Three Strikes Reform Act of 2012 (Reform Act). Defendant alleges that because his convictions are not yet final he is entitled to automatic resentencing as though the Reform Act had passed before he was convicted. Under the

Reform Act, defendant's remedy is to petition the trial court for recall of his sentence. Accordingly, we affirm the judgment.

BACKGROUND

In 2011, a jury found defendant guilty of 62 sex offenses against his daughter, and the trial court sentenced him to a term of 610 years to life, plus 220 years.[1] He was delivered to state prison and began serving his term. Defendant appealed those convictions. We reversed 25 of the 62 convictions and dismissed eight others. We affirmed the remaining 29 convictions and remanded the matter to the trial court for resentencing. Eighteen of the convictions that we affirmed and that did not require resentencing were sentences of 25 years to life.

Six of the counts that we affirmed and that required resentencing involved oral copulation with the victim being under 16 or 18 years of age. (Pen. Code, § 288a, subd. (b)(1) & (2).)[2] These counts required resentencing because each related to a count which had been reversed and/or dismissed and the sentences for these affirmed counts had been stayed under section 654. The stayed sentences for these convictions were each 25 years to life. In 2013, on remand, the trial court lifted the stays and imposed the 25-year-to-life terms. The trial court resentenced defendant to an aggregate indeterminate term of 475 years to life, plus a determinate term of 130 years.

DISCUSSION

In 2012, while defendant's first appeal was pending, California voters passed the Reform Act amending sections 667 and 1170.12 and adding section 1170.126. (§§ 667, subd. (e)(1) & (e)(2)(C), 1170.12, subd. (c)(1) & (c)(2)(C); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 (*Yearwood*).) Defendant contends since his case was not final

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[1] Given the procedural posture of this case and the issue raised on appeal, a recitation of the substantive facts underlying defendant's convictions is unnecessary.

[2] Undesignated statutory references are to the Penal Code.

at the time the Reform Act became effective, he is entitled to retroactive application of the Reform Act to the six counts of oral copulation with the victim being under 16 or 18 years of age. He argues this application entitles him to automatic resentencing under the provisions of sections 667 and 1170.12, subdivision (c). As the parties note, the issue of whether the Reform Act applies retroactively to defendants who were convicted before passage of Reform Act, but whose convictions are not yet final, is currently pending before the California Supreme Court. (*People v. Lewis* (2013) 216 Cal.App.4th 468, review granted Aug. 14, 2013, S211494 [Proposition 36 requires automatic resentencing of people with judgments that are not yet final]; *People v. Conley* (2013) 215 Cal.App.4th 1482, review granted Aug. 14, 2013, S211275 [Proposition 36 does not require automatic resentencing of people with judgments that are not yet final].) Before either *Lewis* or *Conley*, the Fifth District Court of Appeal decided section 1170.12 did not have retroactive effect in *Yearwood*. While the law in this area is unsettled, *Yearwood* remains good law.

As relevant to this case, the Reform Act changed the prospective requirements for sentencing a third strike offender to an indeterminate term of 25 years to life. Under the original version of the three strikes law, a recidivist with two or more prior strikes who was convicted of any new felony was subject to an indeterminate life sentence. (§§ 667, subd. (e)(1) & (e)(2)(C), 1170.12, subd. (c)(1) & (c)(2)(C); *Yearwood, supra*, 213 Cal.App.4th at p. 167.) "The [Reform] Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor." (*Yearwood*, at p. 167.) After passage of the Reform Act, if these exceptions do not apply and the current offense is not defined as a serious or violent felony, the court is to sentence the defendant as a second strike offender. (*Id*. at pp. 167-168.) Section 288a, subdivision (b)(1) and (2) are not defined as serious or violent felonies. (§§ 667.5, subd. (c), 1192.7, subd. (c)(1).)

The Reform Act also provides procedures for defendants, who had already been convicted when the Reform Act passed, to obtain post-conviction relief. This relief is "intended to apply exclusively to persons presently serving an indeterminate term of imprisonment" under the three strikes law "whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a).) To obtain this relief, the defendant must file a petition for recall of sentence in the trial court (§ 1170.126, subd. (b)) and establish "(1) the prisoner is serving an indeterminate life sentence for a crime that is not a serious or violent felony; (2) the life sentence was not imposed for any of the offenses appearing in sections 667, subdivision (e)(2)(C) and 1170.12, subdivision (c)(2)(C); and (3) the inmate has no prior convictions for any of the offenses appearing in clause (iv) of section 667, subdivision (e)(2)(C) or clause (iv) of section 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd. (e).)" "Upon receipt of such a petition, the trial court must determine if it satisfies the criteria contained in subdivision (e) of section 1170.126. (§ 1170.126, subd. (f).) If it does, the prisoner shall be resentenced as a second strike offender '*unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety*.' (§ 1170.126, subd. (f).) In exercising this discretion the trial court may consider the prisoner's criminal history, disciplinary record and record of rehabilitation while incarcerated and any other relevant evidence. (§ 1170.126, subd. (g).)" (*Yearwood, supra,* 213 Cal.App.4th at pp. 170-171, italics added.)

Relying on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), defendant argues *Yearwood* was wrongly decided. In *Estrada*, the Supreme Court held that a legislative amendment that lessens criminal punishment is presumed to apply to all cases that were not yet final when the amendment took effect, unless there is a "saving clause" providing for prospective application. (*Estrada*, at pp. 742, 748.) Section 1170.12 does not have an express saving clause. But even in the absence of an express saving clause, the rule in

Estrada does not apply if the Legislature by other language "clearly signals its intent to make the amendment prospective." (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.)

Statutes enacted into law through the initiative process are construed in the same manner, and are subject to the same principles, as statutes enacted by the Legislature. (*People v. Elliot* (2005) 37 Cal.4th 453, 478.) " '[T]he fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.' [Citation.] As with any question of statutory interpretation, the best indication of legislative intent appears in the language of the enactment. [Citation.] Further, 'we do not construe statutes in isolation, but rather read every statute "with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness." ' [Citations.]" (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1253 (*Peracchi*).) We interpret words in context, give them their plain and ordinary meaning, and avoid constructions that would render words surplusage. (*People v. Loeun* (1997) 17 Cal.4th 1, 9.) One of the most important principles is that statutes dealing with the same subject matter--commonly referred to as statutes "in pari materia"--should be construed together. (*People v. Honig* (1996) 48 Cal.App.4th 289, 327.) Application of this rule is especially appropriate in cases where statutes relating to the same subject matter were passed at the same time. (*Stickel v. Harris* (1987) 196 Cal.App.3d 575, 590.) "[T]he best indication of legislative intent appears in the language of the enactment. [Citation.]" (*Peracchi,* at p. 1253.)

Contrary to defendant's argument, section 1170.126, a related statute added by the Reform Act, defeats the presumption of retroactivity set forth in *Estrada*. As relevant to this discussion, section 1170.126 provides for the resentencing of "persons *presently serving* an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a), italics added.) Section 1170.126 goes on to provide, "[a]ny

person *serving*" a three strikes sentence for a current conviction that is not a serious or violent felony "may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with" the Reform Act. (§ 1170.126, subd. (b), italics added.)

This language is clear. " '[The legislative] use of a verb tense is significant in construing statutes.' [Citations.]" (*People v. Loeun, supra,* 17 Cal.4th at p. 11; see also *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1008.) In these provisions establishing a specific process for resentencing people who were convicted before the passage of the Reform Act, and who are *presently serving* an indeterminate term of imprisonment, the voters have clearly signaled their intention to make the Reform Act's other sentencing changes (§§ 667 and 1170.12) prospective only. A mechanical application of *Estrada,* without due consideration of this statutory language, would have the effect of nullifying the provisions of section 1170.126 for those people, like appellant, whose convictions are not yet final due to the pendency of their appeals.

When the Reform Act was enacted, defendant was in custody serving multiple indeterminate terms of imprisonment. The fact that defendant was resentenced, on remand from his earlier appeal and after the passage of the Reform Act, does not change his status as a person *presently serving* an indeterminate term of imprisonment. "[A]n appellate remand solely for correction of a sentence already in progress does not remove a prisoner from the Director's custody or restore the prisoner to presentence status." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 33 (*Buckhalter*).) "[A] felon once sentenced and committed to prison remains, despite a later remand on sentencing issues, in the custody of the Director, serving time against his ultimate sentence. This holds true whether he is confined in the penitentiary itself or is temporarily housed in county jail pending the remand hearing, and whether his sentence ultimately is modified or is left

undisturbed." (*Id.* at p. 40.) Nor does a recall of sentence "remove a prisoner from the Director's custody or restore the prisoner to presentence status." (*People v. Johnson* (2004) 32 Cal.4th 260, 267 (*Johnson*).) Both *Buckhalter* and *Johnson* involved the issue of custody credits, but our Supreme Court has not limited its reasoning to that issue. The Court has also relied on the reasoning in *Buckhalter* to hold that the reversal of a sentence and remand for resentencing does not permit a defendant to enter a peremptory challenge to the sentencing judge as permitted by former Code of Civil Procedure section 170.6, subdivision (2) upon reversal of a final judgment. (*Peracchi*, *supra*, 30 Cal.4th at pp. 1249, 1254-1256.) This is so because even when a matter has been remanded for resentencing, "the original sentence is not viewed as void ab initio." (*Id.* at p. 1255.)

The reasoning of *Buckhalter* and *Johnson* applies equally here. Defendant did not reacquire presentence status based on our earlier reversal. Nor did he become "unsentenced." We did not reverse or dismiss all of defendant's convictions. To the contrary, we affirmed most of the convictions. At the time the Reform Act was enacted, defendant was serving 17 indeterminate terms which were unaffected by our decision on appeal. Thus, on the date the Reform Act became effective, defendant was a person *presently serving* an indeterminate term of imprisonment pursuant the three strikes law. Those already sentenced and serving an indeterminate term of imprisonment must petition the trial court for a recall of sentence regardless of whether or not their judgment is final. Nothing in section 1170.126 states that its reference to "persons presently serving an indeterminate term of imprisonment . . . whose sentence under this act would not have been an indeterminate life sentence" is meant to apply only to those serving a term of imprisonment under a *final* judgment. (§ 1170.126, subd. (a).) And we may not insert such words into the statute. (Code Civ. Proc., § 1858; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826-827.) Defendant's remedy is to petition the trial court for recall of his sentence under the terms of section 1170.126.

DISPOSITION

The judgment is affirmed.

RENNER, J.

We concur:

RAYE, P. J.

HULL, J.